IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954

No. 614

STATE OF WISCONSIN, ex rel
WISCONSIN LUTHERAN HIGH
SCHOOL CONFERENCE,

Appellant,

vs.

SID H. SINAR, Inspector of Buildings
of the City of Wauwatosa, Wisconsin,
E. L. VANDERJAGT,

Appellees.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

I. NATURE OF THIS BRIEF

This is appellant's brief in opposition to the motion by appellee, Sinar, to dismiss the appeal.

II. ISSUE

Has the appellee set forth sufficient grounds to sustain its motion to dismiss?

III. THE CONTENTIONS

A. The appellee has moved to dismiss the appeal upon the following grounds:

1. There is no substantial federal question involved.
2. The main question is one of fact and therefore not reviewable in this Court.
3. The judgment rests upon an adequate non-federal basis.

B. The appellant contends that the motion to dismiss must fail because:

1. There is a substantial federal question involved.
2. The main question is not one of fact; and in any event this is not a ground under the Rules of the Supreme Court of the United States governing motions to dismiss appeals.
3. The validity of the Wisconsin Statute having been challenged as repugnant to the federal constitution and having been declared valid, the judgment rests upon a federal question only.

IV. ARGUMENT

A. The Substantiality of the Federal Question Involved.

Although we feel that many of the cases cited by the appellee and many of the propositions averred by it are not to the point of the motion, nevertheless they are considered here, insofar as they deal with the procedural point which is at issue rather than with the merits of the matter, in the order in which they appear in appellee's brief.

The opinion of the Supreme Court of Wisconsin in the instant case stated (267 Wis. 91, at page 96, 65 N.W. 2nd 43, at page 46, Statement of Jurisdiction page 23):

> "Respondent submits, therefore, that [the ordinance's discrimination] * * * is a measure which denies to respondent the equal protection of the laws and deprives it of property without due process of law, contrary to the provisions of the 14th Amendment of the United States Constitution."

and the Court further stated (267 Wis. at page 101, 65 N.W. 2d at p. 48, Statement of Jurisdiction p. 29):

> "We consider the authority very strong in support of the conclusion which we have already reached independently, that no unconstitutional or otherwise illegal discrimination appears in the Wauwatosa zoning ordinance by reason of its exclusion of private high schools from "A" Residence Zones while accepting public schools of the same rank."

None of the cases cited by the appellee in his argument that there is no substantial federal question involved can detract from the Wisconsin Court's clear statement that the 14th Amendment of the federal constitution is involved.

In general, the cases cited by the appellee under this heading only support the doctrine, well settled, that the legislature, not the courts, are the judges of the wisdom or the public policy of a legislative enactment. Only one of the cases cited (*Lionshead Lake v. Wayne Township*, 10 N.J. 165; 89 Atl. (2d) 693) is an example of a case dismissed for want of a substantial federal question, which is the sole issue to be treated under this heading. We comment upon the appellee's cited cases in order as follows:

1. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L. ed. 1188 (1199), 114 A.L.R. 1487 (Annot. P. 1500), no question arose as to the constitutionality of the Pennsylvania law which the court held was to be applied by the federal court. No federal substantive statute or constitutional provision was involved.

2. In *State Tax Comm. v. Jackson,* 283 U.S. 527, 75 L. ed. 1248, 51 S. Ct. 540, 543; 73 A.L.R. 1464; 75 A.L.R. 1536, this court sustained a state tax statute because, it held, it treated upon a similar basis all owners of chain stores similarly situated. In the instant case, the Wisconsin Court does not treat upon a similar basis all owners of high schools. The statement quoted in appellee's brief as to the determination by the legislative body as to public policy is not here material nor controverted.

3. Likewise the quoted portion of the statement from *People v. McCall,* 245 U.S. 345; 38 S. Ct. 122; 62 L. ed. 337, is not controverted by the appellant here, because it is not material. But we point out that, of the sentence quoted by appellee, an important portion was omitted, and reads:

> "* * * yet [the Court] will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the Federal constitutional right claimed has been denied; as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the commission as to violate the due process clause of the constitution."

4. While the mere *construction* of an ordinance does not present a federal question, the Supreme Court in *Fischer v. St. Louis* (194 U.S. 361, 48 L. ed. 1018) considered whether the ordinance as construed was invalid as repugnant to the federal constitution. The appeal was

not dismissed for want of a federal question, but was heard, to consider the federal question.

5. Although the Court accepted the appeal in *Rescue Army v. Municipal Court,* (331 U.S. 549; 91 L. ed. 1666), it did not pass upon the federal questions because serious problems as to the *construction* of the city ordinance there involved had not been resolved at the state level.

6. The ruling in *Independent Warehouses Inc. v. Wm. Scheele,* 331 U.S. 70; 91 L. ed. 1346, quoted by appellee (which was not the Court's statement, but only the reporter's headnote) had to do with the alleged illegality of a municipal tax as against *the state laws* governing taxation. No similar question is present in the instant case.

7. The federal question *was* considered in *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509; 81 L. ed. 1245, 1253; 57 S. Ct. 868; 109 A.L.R. 1327; there was no dismissal for lack of any federal question.

8. No constitutional question was involved in *Breisch v. Central R. Co.,* 312 U.S. 484; 61 S. Ct. 662; 85 L. ed. 964, but only the *interpretation* of a state statute.

9. This Court did not dismiss for lack of a federal question the appeal from the Minnesota Supreme Court in *Beery v. Houghton,* (164 Minn. 146; 204 N.W. 569; 273 U.S. 671.)

10. *Radice v. New York,* 264 U.S. 292, 294; 44 S. Ct. 325; 68 L. ed. 690, cannot properly be cited to the proposition of dismissal for lack of substantial federal question —the court did not dismiss the case, but *considered* that the legislature had a basis for finding that night work as a waitress was unhealthy and unsafe and that the state could therefore legislate against it.

11. In *Berman v. Parker,* 75 S. Ct. Rep. advance p. 98, 99 L. ed. (Advance p. 63), this Court by hearing the case indicated that it felt the federal question involved was substantial despite its recognition of the legislature's authority, thus establishing that the legislative declaration does not preclude examination of the federal question.

12. *Day-Brite Lighting Inc. v. State of Missouri,* (342 U.S. 421; 72 S. Ct. 405, 407; 96 L. ed. 469) was cited as another example of the proposition that the legislature may decide policy, the wisdom of which is not subject to Supreme Court review; but this Court *considered* carefully the contention as to the repugnancy of this statute to the federal constitution. The appeal was not dismissed for lack of a substantial federal question.

13. *Lionshead Lake v. Wayne Township,* 344 U.S. 919; 73 Sup. Ct. Rep. 386; 97 L. ed. 708, 10 N.J. 165; 89 Atl. (2d) 693, is the only case cited by appellee which, in fact, was dismissed for want of a substantial federal question. The report of this United States Supreme Court case gives no further explanation for the dismissal. An examination of the New Jersey decision shows no mention made of the federal constitution and no contention made of deprivation of property without due process nor lack of equal protection of the laws. The absence of these contentions and of a specific mention of the federal constitution would clearly be grounds for dismissal in the United States Supreme Court for want of a substantial federal question. These contentions and the provisions of the federal constitution were not omitted in the instant case, but were strenuously urged upon the Wisconsin Supreme Court.

14. Appellee has referred to *Euclid v. Ambler R. Co.* (272 U.S. 365, 47 Sup. Ct. Rep. 114, 71 L. ed. p. 303)

on page 8 of its brief. It is noteworthy that this leading case upon the question of the constitutionality of municipal zoning ordinances mentions that there was nothing in the record of that particular case having to do with schools and churches, libraries, and other public and semi-public buildings and, consequently, the court said, on pages 309 and 310 of 71 L. ed. and on page 385 of 272 U.S.:

> " • • • the provisions of the ordinance in respect of these uses may therefore be put aside as unnecessary to be considered".

The instant appeal, in raising a federal question with reference to schools, previously omitted from consideration in what is generally considered to be the leading case on the subject, now presents not only a federal question but a substantial question which this court has not heretofore passed upon directly.

B. Appellee's Contention That the Main Question Involved is a Question of Fact.

We find no rule or law which provides that this contention is a ground for dismissal.

Although this is not a ground for dismissal of the appeal, we discuss herein, in the order cited by the appellee, the cases cited by it.

1. *State of Wisconsin, ex rel Wisconsin Lutheran High School Conference v. Sinar* is the instant case. Appellee makes the surprising contention that the Wisconsin Supreme Court decided this case upon the facts determined by it (by virtue of demurrer to the defendant's return to the petition for writ of mandamus) concerning the private school, as contained in the portion of the opinion quoted by appellee. These facts cannot possibly be the

basis of the decision when the rest *of that paragraph,* omitted by appellee from its quotation, is stated. The omitted portion, which is the crux of the thought, and which completely deflates appellee's argument, reads:

> "Other detriments are easily thought of, but as respondent points out, *each such discordant feature attends the presence of a public school to an equal degree.*" (Italics supplied)

State of Wisconsin, ex rel Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, p. 96, 65 N.W. 2d 43, p. 46; Statement of Jurisdiction, p. 23. Clearly such findings of fact which apply equally to the private and the public school could not be and were not the basis for the judgment of the Wisconsin Court.

2. In *Minneapolis & St. Louis R. Co. v. Minnesota,* (193 U.S. 53, 24 S. Ct. 396; 48 L. ed. 614) the United States Supreme Court recognized the validity of the findings of fact and also recognized the need for taking jurisdiction to *consider* whether the legislative or administrative body had exceeded its powers and violated the safeguards of the federal constitution.

3. The court in *Hendersonville Light & Power Co. v. Blue Ridge Int. Ry. Co.* (243 U.S. 568; 37 S. Ct. 441; 61 L. ed 905) cited the *Minneapolis & St. Louis R. Co. v. Minnesota* (supra) only to show that the United States Supreme Court had the right to hear the appeal because the mere raising of the federal constitutional question in the Minnesota court created a *substantial* federal question. Of course, it is this very contention which we assert as a reason why the United States Supreme Court should entertain the appeal in the instant case.

4. In *Pure Oil Co. v. Minnesota,* (248 U.S. 158; 39 S. Ct. 35, 63 L. ed. 180), the findings by the Minnesota court, considered binding on the United States Supreme

Court, nevertheless did not preclude the appeal to this Court.

5. The United States Supreme Court dismissed the appeal in *Willoughby v. Chicago,* 235 U.S. 45; 35 S. Ct. 23; 59 L. ed. 123, for the reason that the issue was one of *construction of the state statute.* This has no analogy whatever to the instant case.

C. Appellee's Contention That the Wisconsin Judgment Rests on an Adequate Non-Federal Basis.

The necessary effect of the Wisconsin judgment, after the validity of the statute was challenged as being repugnant to the federal constitution, was to deny the claim of invalidity. The decision, therefore, rests squarely upon the federal question. To hold that this is not reviewable in the United States Supreme Court merely because Wisconsin held the statute to be constitutional would be to discard the guarantees set forth in the United States Constitution. In view of the challenge to the constitutionality and in view of the language of the Wisconsin Supreme Court in the instant case, it must be amply apparent that the judgment does not rest on any non-federal basis. Cyclopedia of Federal Procedure, 3d Edition, § 57.188, pp. 285, 287.

1. Appellee fails to point out under this heading any other than a federal basis which was or could have been the basis for the Wisconsin decision. Appellee cites *McCarter v. Beckwith,* 285 N.Y. Supp. 151, 3 N.E. 2d 882; Certiorari denied, 299 U.S. 601; 57 S. Ct. 194; 81 L. ed. 443, for the proposition that even though a federal question is presented and preserved, this Court will not review a state court decision resting upon adequate tenable state grounds. The case does not so hold. *McCarter*

v. Beckwith (supra) came to the United States Supreme Court on a writ of certiorari which was denied, with no reason given. However, the appellee assigns a reason which we feel is unjustified: The trial court found as facts that there were several bases upon which public beaches could be distinguished from private beaches; the New York Court of Appeals affirmed, per curiam, without opinion; the report of the case fails to show that a federal constitutional question was before the trial court.

2. Appellee cites *Golf Inc. v. District of Columbia* (67 Fed. 2d 575) to support the contention that a finding as to the distinctions between public and private purposes is sufficient for a determination of the question and that no federal question then arises. Ample refutation of this is found in the numerous cases cited by appellant in its Statement of Jurisdiction (pages 12, 13, 14, 15 and 16) wherein all the state courts that have dealt with the subject of schools in zoning ordinances have found that the ordinances in question restricting private schools were invalid *because repugnant to the federal constitution.*

3. Likewise *Cincinnati v. Wegehoft* (1928), (119 Ohio 136, 162 N.E. 389), not having to do with schools and no appeal having been attempted therefrom, can hardly be considered as authority for the statement that no federal question is involved in the instant decision.

4. In *Wallerstein v. Westchester,* 1 N.Y.S. (2d) 111, and *Decatur Park District v. Becker* (1938) 368 Ill. 442; 14 N.E. (2d) 490, the courts permitted the erection of structures not even provided for in the zoning ordinance. In the one, a combination of municipalities erected a water tower and in the other a park district condemned land for park purposes. In neither case was the municipality whose land was involved the owner of the public

or semi-public structure or use which, it was held, the zoning ordinance could not prohibit. In neither of these cases or in *DePalma v. Town Planning Comm.*, 123 Conn. 257, 193A. 868, was there an attempt to appeal to the United States Supreme Court. They cannot be cited to support dismissal of such an appeal, therefore. *American University v. Prentice,* 113 Fed. Supp. 389, and *Prentice v. American University,* 214 Fed. 2d 282, were discussed in appellant's Statement of Jurisdiction.

The case of *Church of Latter Day Saints v. City of Porterville,* cited in appellee's brief as being 90 Cal 2, 656; 203 Pac. 2d 917,[1] was appealed to this court, 338 U.S. 805, 94 L. Ed. 487, but does not support the proposition set forth under this heading of appellee's brief. In dismissing the appeal this court found no substantial federal question present. The court did *not* declare that the California judgment rested on an adequate non federal basis. Unlike the plaintiff in the instant case, the plaintiff in the California case was not discriminated against, and there was no question of unequal protection of the laws. Appellee states that *Church of Latter Day Saints v. City of Porterville* discusses and upholds the several rules and presumptions theretofore discussed in its brief. We find no discussion of *any* presumption and the contention as to discussing and upholding "the several rules" is too vague to merit answer.

V. CONCLUSION

The appellee's motion to dismiss the appeal should be denied because:

a. The appellee fails to show that this appeal does not present a federal question and fails to show that it is

[1]The correct citation appears to be: 90 Cal App 2d 656, 203 P 2d 823.

not a substantial federal question since the Wisconsin Court rested its decision squarely upon the federal constitutional question; the question is a substantial one (and the sole one) because the United States Supreme Court has not yet passed upon this issue and because of all the state supreme courts that have passed upon it Wisconsin's is the only one that has not considered the restrictive ordinance to be unconstitutional.

b. The appellee has completely failed to indicate that the Wisconsin judgment rests upon an adequate or, in fact, any, non-federal basis. If the judgment of a state court that the state's statute is constitutionally valid were to give such judgment, per se, a non-federal basis, then the safeguards in the United States constitution to protect life, liberty and property would be completely ineffective.

c. The appellee's contention that a question of fact, only, is here involved and hence this case is not reviewable by this Court, is not a ground for dismissal of the appeal under the Rules of the Supreme Court; and if it were, is not supported by the law nor the cases cited.

Respectfully submitted,

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